In The

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 80-6845

DONALD GENE BOAG,

Appellant-Petitioner,

v.

ELLIS MacDOUGALL, Director, Arizona Department of Corrections; and WILLIAM RHODE, Superintendent of Alhambra Reception and Treatment Center,

Appellees-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Ellis MacDougall, et al., through the Arizona Attorney General, respectfully request that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's disposition of this case on or about June 2, 1981.

REASONS WHY THE WRIT SHOULD BE DENIED

1. Neither the decision below nor the record present a reason for the grant of certiorari.

Petitioner argues that the District Court erred when it dismissed his pro se civil rights action brought pursuant to 42 U.S.C. § 1983 for the reason that it was moot because Petitioner had been transferred from that prison prior to the time the complaint was filed. He was transferred from the facility complained of on March 12, 1980 and his complaint herein was filed on March 25, 1980. He argues that because his claim contained a prayer for compensatory and punitive damages the claim is not moot as to those allegations.

Lokey v. Richardson, 600 F.2d 1265, cert. denied 101 S.Ct. 238 (9th Cir. 1979) involved a well developed record upon which the court determined that a claim for damages had been developed. In this case, however, it was clear to both lower courts that the claim asserted was frivolous. As was stated in Tawwab v. Metz, 544 F.2d (2nd Cir. 1977), where the plaintiff's claim was held moot, "Any award of damages on the facts of this case, as alleged in the complaint, would be so remote and speculative that it could not stand." 554 F.2d at 24, n.4.

It is clear that this case was treated as a proceeding in forma pauperis by both lower courts. As such, Title 28, U.S.C. § 1915(d) provided for summary dismissal by the court when the complaint is found to be frivolous.

Milton v. Nelson, 527 F.2d 1158 (9th Cir. 1975); Boag v. Boies, 455 F.2d 467 (9th Cir.) (per curiam), cert. denied, 408 U.S. 926 (1972). The discretion of lower courts under § 1915(d) is "especially broad" in civil rights actions against prison officials, and such dismissals will not be reversed in the absence of an abuse of that discretion. Milton, supra.

Here, the Petitioner has shown no abuse of the lower court's discretion, and the appellate court's affirmation is proper. For the appellate court to affirm for the reason that it found the complaint frivolous as opposed to moot is of no significance. No authority is cited by Petitioner to show that as improper. Certainly a moot issue could be considered frivolous within the meaning of that word. What could be more frivolous than a complaint which appears moot on its face?

A case strikingly similar to the case sub judice is Boag v. Boies, 455 F.2d 467 (9th Cir.), cert. denied, 408 U.S. 926, 92 S.Ct. 2509, 33 L.Ed.2d 338 (1972). In Boag the appellant appealed from an order of the District Court denying his motion for leave to proceed in forma pauperis in a civil rights complaint against certain Arizona deputy sheriffs. The reason stated for such denial was that Boag failed to state a claim for which relief could be granted. In affirming the District Court's ruling, the Ninth Circuit Court of Appeals noted that the District

Court acted without notice to Boag that the court was considering dismissal of the complaint, without affording Boag an opportunity to submit written argument, and without affording him an opportunity to amend his complaint. The court further noted that if the court's action constituted dismissal of the action with prejudice for failure to state a claim upon which relief could be granted, it would be necessary to reverse. Id. at 468. However, the court ruled as follows:

> "But what was pending before the district court was plaintiff's motion to proceed in forma pauperis. Under 28 U.S.C. § 1915(d), a case sought to be prosecuted in forma pauperis may be dismissed if the district court correctly determines that it is frivolous. While the district court did not here expressly rule that this case is frivolous, we think this is the real reason for the court's denial of the motion to proceed in forma paupers and conclude that it is a sound reason." 455 F.2d at 468-469.

Under 42 U.S.C. § 1915(d) where the petitioner has been granted leave to proceed in forma pauperis but the court subsequently determines that the complaint is frivolous or malicious, it can be dismissed without

service of process. Watson v. Ault, 525 F.2d 886 (5th Cir. 1976); Forester v. California Adult Authority, 510 F.2d 58 (8th Cir. 1975); Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976).

Once a claim is rendered moot, it will always remain moot and that very same issue can never again be "live." Therefore, it would have been futile for the Court of Appeals to have ordered the case to be remanded with directions to file an amended complaint because the deficiency could not possibly have been cured by the amendment.

The Petitioner's allegation of violation of the Fourteenth Amendement's due process clause by being placed in "the hole" is also insufficient to state a claim upon which relief may be granted and is legally frivolous. A transfer to "the hole" or other higher or stricter custody level does not by itself constitute a violation of the due process clause of the Fourteenth Amendment. Montanye v. Haymes, 427 U.S. 236, 242, 96 S.Ct. 2543, Spain v. Procunier, 600 F.2d 189 (9th Cir. 1979).

The original complaint does not contain any allegations which show that the State of Arizona has established a procedure, the violation of which might give rise to a claim of denial of due process of law. Wright v. Enomoto, 462 F.Supp. 297(N.D. Cal. 1976), aff'd 343 U.S. 1052, 98 S.Ct. 1223, 55 L.Ed.2d 756 (1978). However, even assuming that such

rules were in existence at the time of the alleged violation, procedural rules created by state administrative bodies cannot, of themselves, serve as a basis for a separate protected liberty interest. Bills v. Henderson, 631 F.2nd 1287 (6th Cir. 1980). Every deviation from state procedures cannot be viewed as a federal constitutional violation, Id. A.R.S. § 41-1604 (B)(2) places transfers of "adult inmates between adult institutions or adult facilities" in the discretion of the Director of the Department of Corrections. Therefore, a claim that an administrative transfer to a higher custody level pursuant to a statute vesting that authority in the Director of the Department of Corrections is frivolous.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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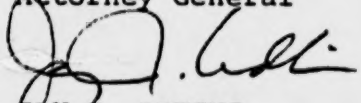

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